

To: Our Clients and Friends

July 1, 2011

## UK Bribery Act Comes Into Force

Today, as widely anticipated, the UK Bribery Act 2010 came into force. It will affect not only UK companies and UK individuals, but also non-UK commercial organisations and their affiliates that do business in the UK.

The new Act goes beyond the US Foreign Corrupt Practices Act (the FCPA) and the requirements of the OECD Bribery Convention in certain respects. It covers UK domestic as well as foreign bribery. It includes acceptance of a bribe. It extends to “private to private” bribery as well as to bribery of public officials, including foreign officials. There is no statutory carve-out for facilitation payments. There is no statutory carve-out for reasonable and bona fide promotional expenses, although Guidance from the UK Ministry of Justice suggests that the Government does not intend the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended to improve the image of a commercial organisation, better to present products and services, or establish cordial relations.

Among the more controversial provisions of the Act is the new strict liability offence for failure by commercial organisations doing business in the UK (regardless of where they are incorporated) to prevent bribery anywhere in the world by persons associated with them – persons anywhere in the world that perform services for the organisation – intending to obtain or retain business or a business advantage for the organisation. There is no requirement for the associated person to have a close connection with the UK and the bribe does not have to be related to UK business. The Serious Fraud Office (SFO), the principal prosecutorial authority for the new Act, has stated that it takes a wide view of its powers to prosecute companies.

There is a statutory defence to this strict liability offence if the commercial organisation can prove that it had in place “adequate procedures” designed to prevent associated persons from engaging in bribery. The UK Ministry of Justice has issued Guidance on adequate procedures and other aspects of the Act. See Bryan Cave’s International Regulatory Bulletin No. 480. The Guidance does not (and indeed cannot) set hard and fast rules as to what would constitute adequate procedures, and sets out six basic principles for judging such procedures, as follows:

- Proportionate Procedures – Procedures should be proportionate to the bribery risks faced by and the size and complexity of the organisation.
- Top Level Commitment
- Risk Assessment
- Due Diligence
- Communication and Training
- Monitoring and Review

The SFO has also issued Guidance as to how prosecutorial discretion is likely to be approached in respect of certain aspects of the Act. The courts will be the final arbiters in respect of these issues.

Both the UK Bribery Act and the FCPA, as well as other potentially applicable anti-corruption laws, make adoption and effective implementation of an adequate compliance program a must. Now, more than ever, companies need to review their policies and procedures.

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